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SUIT FOR SEPARATE MAINTENANCE INDEPENDENT OF DIVORCE.

The broad statement is frequently made that all authority to award alimony is referable solely to the written law. Such statements when considered independently of the particular decisions are in general mere dicta.

EARLY STATE OF LAW IN ENGLAND.

Where the husband has turned the wife out of doors, or by his ill-usage it is unsafe for her to live with him, or where he has quit the Kingdom, a bill for alimony will lie. *Duncan* v. *Duncan,* 19 Vesy. 394.

> I take it to be now the established law, that no court, not even the Ecclesiastical court, has any original jurisdiction to give a wife separate maintenance. It is always as incidental to some other matter that she becomes entitled to a separate provision. If she applies to this court upon a *supplicavit* for surety of the peace against her husband, and it is necessary that she should live apart, as incidental to that, the Chancellor will allow her separate maintenance. So in the Ecclesiastical court, if it is necessary for a divorce *a mensa et thoro propter soevitiam." Ball* v. *Montgomery,* 2 Vesy Jr. 195.

There are so many contradictions and inconsistencies in the dicta of the English law writers relative to the jurisdiction of a court of chancery in cases of alimony independent of divorce, that it is only by a careful examination of the facts and dates that the truth can be ascertained.

The very first case in which the court of Chancery decreed alimony in a suit independent of divorce was that of *Lashbrook* v. *Tyler* decided in the year 1631. 1 Rep. in Ch. 24.

In the year 1650, after the death of Chas. I and the commencement of the Commonwealth, upon a naked bill for alimony the wife was relieved. *Ashton* v. *Ashton,* 1 Rep. in Ch. 87.

In two other cases decided during the existence of the Commonwealth alimony was decreed the wife in a suit independent of divorce. These cases were afterwards brought on again after the Restoration in different shapes and for different purposes. *Russell* v. *Bodvil,* 1 Rep. in Ch. 99; *Whorewood* v. *Whorewood,* 1 Rep. in Ch. 118.

Alimony was decreed the wife in a suit independent of divorce in the following cases: *Oxenden* v. *Oxenden,* 2 Vern. 493; *Head* v. *Head,* 3 Atk. 295-547.

EARLY STATE OF THE LAW IN VIRGINIA.

"From the foundation of the Colony," says Mr. Minor, "the Legislature of Virginia had exercised the power of granting divorces *a mensa* and *a vinculo* by special act," and he observed that "for more than a century there was no other power by which it could be brought about." 1 Minor Inst. 299.

The General and County Courts in Colonial times granted divorces *a mensa et thoro.* The General Court was invested with general ecclesiastical jurisdiction by act of the Assembly of 1748 Ch. 6. *Goodwin* v. *Lunan,* 1 Jeff. 96. As early as 1645, the County Courts were courts of general jurisdiction in law and equity. 4 Minor Inst. p. 226. And as there appears to have been no act of the Assembly conferring jurisdiction in ecclesiastical causes upon the County Courts, these courts undoubtedly exercised jurisdiction in granting divorces *a mensa et thoro,* in the exercise of their equitable powers.

"No absolute divorces, however, were granted in the Colonial period, but divorces *a mensa et thoro* were granted both by the General and County Courts." 1 Colonial Dec. 168. See *Almond* v. *Almond,* 4 Rand. 662.

"The whole subject of spiritual causes was, with profane indifference . . . administered by the regular secular courts in Virginia, along with and with the same form of procedure as any mere secular matter." 1 Colonial Dec. 167.

In England before the statutes permitting divorces, a divorce a vinculo for a supervenient cause such as adultery, could be had only through means of a special act of Parliament. 1 Black Com. 441 note.

In the Act of the Virginia Legislature passed Feb. 17, 1827, provision was first made for a dissolution of the marriage upon pre-existing grounds, and for divorces *a mensa et thoro* for cruelty, desertion and adultery, to be tried in the Superior Courts of chancery, but "every person intending to petition the Legislature for a divorce" (a vinculo) "shall file in the Clerk's Office of the Superior Court of Law . . . a statement of the causes on which the application is founded . . . By that act also the Courts were empowered to grant "maintenance to either, out of the property of the other."

In England we have it upon the testimony of Shower that,

> "During the usurpation, the Court of Chancery exercised a jurisdiction in cases of alimony, there being then no spiritual courts, nor any toleration of the Civil lay; and ten Judges certified in Mich. Term 1662, that such decrees for alimony were confirmed by the Act of Confirmation of Judicial Proceedings (See Ch. Rep. 224); but upon the reestablishment of Courts Christian, the Court of Chancery no longer retained this jurisdiction, insomuch, that when afterwards a bill was brought for alimony in the Court of Chancery, a demurrer was allowed." 1 Mad. Ch. 385.

To the contrary, the cases of *Williams* v. *Callow* decided in 1717, 2 Vern. 752, and *Watkyns* v. *Watkyns,* decided in 1740, 2 Atk. 98, show that bills for alimony independent of divorce were entertained by the Courts of Chancery.

In the case of *Purcell* v. *Purcell,* 4 H. & M. 507, decided by the Supreme Court of Appeals of Virginia February Term 1810, it was held that the Court of Chancery had jurisdiction of a bill for alimony.

In the case of *Spencer* v. *Ford,* 1 Rob. 648, decided by the same Court in 1823, the wife was decreed money collected by her attorney from her husband by way of compromise in her suit against her husband for alimony independent of divorce.

In the case of *Almond* v. *Almond,* 4 Rand. 662, decided by the same Court in 1826, it was held that: "A Court of Chancery has power to grant alimony to a wife in Virginia even without a contract for separation, where the misconduct of the husband is such as to render it unsafe for the wife to live with him, or he turns her out of doors without support.

The question whether a suit for alimony independent of divorce would lie was raised by demurrer in the case of *Beatty* v. *Beatty,* 105 Va. 213, but the appeal was dismissed on other grounds without discussing the demurrer to the bill.

In the case of *Kiser* v. *Kiser,* 108 Va. 734, it was said:

> "It is to be observed, however, that the cases cited from 4 Rand. and from H. & M. were decided at a time when Courts had no jurisdiction to grant divorces, and when divorces could only be obtained by petition to the Legislature of the State. The better opinion may be, that since courts have been authorized to grant divorces, our statute law upon the subject is to be looked to as the sole fountain of jurisdiction over persons and their property with respect to the allowance of alimony to be exercised in proceedings for divorce; and if that be true, then the remark of Judge Staples is also true, that those statutes only allow alimony as incident to a decree for divorce."

The argument is made that the Purcell and Almond cases must be distinguished because there were no divorce statutes in Virginia when these cases were instituted. No such reason is given for the opinion in either of the cases. Plainly in them equity was accorded jurisdiction on the ground that the wife had no adequate remedy at law to secure a divorce but the maintenance due to her from her husband. *Lang* v. *Lang,* 70 W Va. 205.

It is true that after the establishment of the Commonwealth there were no divorce statutes in Virginia until the Act of 1827, but it is not true that the Legislature was the only source of power of granting divorces *a mensa et thoro.* The jurisdiction of the General and County Courts was not changed or altered since 1748 until the year 1827 when the Superior Courts of Chancery were granted power to decree divorces *a mensa et thoro,* and the Purcell and Almond cases arose before the latter year.

The provision for alimony made in the statute concerning divorces was not intended to be a prohibition to granting alimony in other cases; that the power to decree alimony falls within the general powers of a court of equity and exists independent of statutory authority. *Galland* v. *Galland,* 38 Cal. 265.

It has been argued that to grant alimony in an independent suit is equivalent to granting a divorce from bed and board, as it necessitates a determination of the queston whether the wife has good cause for living separate from her husband. The fallacy of this argument lies in the assumption that authority to pass upon the wife's right to separate maintenance is dependent upon jurisdiction over the subject of divorce. Neither Courts of equity or common law in determining by their respective adjudications that the wife has just cause to living separate, actually authorize the spouse to live separate and apart. 1 R. C. L. 881.

The mere fact that statutory provision has been made for awarding alimony when divorces are granted, does not exclude by implication, any jurisdiction the Courts have had to enforce the fulfillment of that obligation, in an action independent of proceedings for a divorce. *Edgerton* v. *Edgerton,* 12 Mont. 122.

In the case of an absolute divorce terminating the matrimonial ties, the duty of support no longer exists at common-law, and in the absence of a statute continuing the obligation of maintenance beyond the dissolution of the marriage, it is difficult to find a basis for awarding alimony. 1 R. C. L. 877.

Alimony although a creature of the Ecclesiastical Courts was in fact a legal right of maintenance recognized by the common law. *In re Popejoy,* 26 Col. 32; *Edgerton v. Edgerton, supra.*

Suits for alimony were originally of ecclesiastical cognizance and the sentence was enforced by spiritual censures. 3 Bl. Com. 94.

Courts of Chancery have granted the wife alimony independent of a suit for divorce in the cases following: *Jelineau* v. *Jelineau,* 2 Des. Eq. 45; *Prather* v. *Prather,* 4 Des. Eq. 33; *Helms* v. *Franciscus,* 2 Bland. 544; *Galwith* v. *Galwith,* 1 Har. & Mc H. 447; *Turrell* v. *Turrell,* 2 John. Ch. 391; *Lockbridge* v. *Lockbridge,* 3 Dana 28; *Bogess* v. *Bogess,* 4 Dana 38; *Butler* v. *Butler,* 4 Litt. 202; *Mayburg* v. *Mayburg,* 7 Ben. Mon. 424; *Wray* v. *Wray,* 3 Ala. 187; *Anshutz* v. *Anshutz,* 1 C. E. Green 162.

To hold to the contrary would leave the law open to the charge that it was so framed as to encourage divorces; for the wife who kept faith with the marriage vows might be driven

by privation in some cases at least to release the husband from the bond of matrimony by applying for a divorce in order to obtain relief from penury and want. 38 L. R. A. (N. S.) 950 note.

In some states the view is still maintained that equity has no jurisdiction to award alimony except as incident to a suit for divorce or separation. The weight of authority, however, has shifted, and in a very decided majority of the states it is now the settled rule that the jurisdiction of equity courts to award alimony is not merely incident to divorce or separation, but it is inherent, and that alimony will be awarded in an independent suit therefor. 1 R. C. L. 879.

Of course, alimony will not be decreed where the parties are living together. Alimony will not be decreed unless there be a separation. 1 Ca. Ch. 251.

And if alimony be decreed solely because of the separation, the husband may bring an original bill, and have it set aside or suspended, on offering to become reconciled. But such offer shall not discharge the arrears. 3 Atk. 296; 1 Ca. Ch. 251.

COMPETENCY OF THE PARTIES TO TESTIFY.

It was held in the case of *Selders* v. *Selders,* 9 Kans. App. 428, that the wife was an incompetent witness to testify against her husband in a suit for alimony. That court based its views solely upon its statutes.

The same Court in the case of *Leftwich* v. *Leftwich,* 19 Kans. 451, came to an opposite conclusion viewing the case solely from a statutory angle.

The question is whether at common law unaided by the statutes the wife is a competent witness in such a suit against her husband. There seem to be no cases which deny her that right.

Her affidavit was admissible on an application for an information against him for an attempt to take her by force contrary to articles of separation. Her affidavit was also admitted in a habeas corpus sued out by him for the same object. Bull's N. P. 287; *Rex* v. *Mead,* 1 Burr. 542.

From the necessity of the case, as in assault and battery and

other offenses by the husband against the wife, she has always been admitted as a witness against him. 1 Greenl. Ev. 343.

A suit for separate maintenance is not a divorce suit, and the common-law rule, and our statutes on divorce are inapplicable. The main issue in such a case is that of non-support, the cause for the separation is a secondary one, but, the marriage must of course, be first proved. No rule of public policy could be violated in permitting the wife to testify to the failure of the husband to support her, and her grounds for making the application, whether based upon the cruelty or abandonment.

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